(2)

No. 10-108

In The
Supreme Court of the United States

DONALD LEE KING and TINA MARIE KING,

Petitioners,

v.

PIONEER REGIONAL
EDUCATIONAL SERVICE AGENCY,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Georgia Third Division

PETITIONERS' REPLY BRIEF

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I. THE EXISTENCE OF AN IMPORTANT CONFLICT AMONG THE LOWER COURTS IS NOT DISPUTED

Respondent acknowledges the existence of the inter-circuit conflict described in the petition regarding *City of Los Angeles v. Heller*, 475 U.S. 796 (1986). (Br. Opp. 9 ("the *Heller* circuit split question"), 29 ("however intriguing the *Heller* circuit split issue might be"; "resolution of that split"), 30 ("the *Heller* circuit split")). Respondent also agrees that the decision of the Georgia Court of Appeals involved an interpretation of *Heller*. "The Georgia Court of Appeals decision in this case ... rests on a reading of *City of Los Angeles v. Heller*." (Br. Opp. 3; see *id.* 29 ("the Court of Appeals of Georgia did not misapply *Heller*")).

The issue set out in the petition was repeatedly litigated by plaintiffs in the courts below[1]; in the

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[1] Motion for Reconsideration, *King v. Pioneer Regional Educational Service*, Court of Appeals Case No. A09A1567, at 6 (quoting decision in *Anderson v. City of Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985) that "[a]lthough the acts or omissions of no one employee may violate an individual's constitutional rights, the combined acts or omissions of several employees acting under a governmental policy or custom may violate an individual's constitutional rights"), 7 (Court of Appeals reliance upon *Heller* was "misplaced").

Appellants' Reply to Response of Appellee Pioneer RESA on Appellants' Motion for Reconsideration, Court of Appeals Case No. A09A1567, at 2 ("*Heller* does not preclude Pioneer's liability"), 3 ("the error of this Court's reliance on *Heller*), 4 ("Pioneer's suggestion that *Heller* precludes liability ... is demonstrably

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Georgia courts plaintiffs relied on many of the same federal circuit court decisions set out in the petition for certiorari in this Court.

II. THE COURT OF APPEALS DECISION DID NOT REST ON AN INDEPENDENT GROUND PRECLUDING REVIEW BY THIS COURT

In the courts below, in addition to advancing the *Heller* argument on which it there prevailed, respondent also contended that Pioneer had no affirmative constitutional duty to protect Jonathan King. In its brief in opposition, Pioneer argues that the Court of Appeals actually decided this constitutional issue and held that respondent had no such affirmative duty. A decision by the Court of Appeals on that alternative argument, Pioneer argues, would constitute an independent state ground barring review by this Court of the *Heller* issue. However,

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wrong"), 6 (*Heller* is "distinctly *unlike* the instant case in which the alleged constitutional violation is not solely attributable to an individual actor") (emphasis in original), 7 (Court of Appeals "misapplied *Heller*").

Petition for Writ of Certiorari, *King v. Pioneer Regional Educational Service Agency*, No. S10C0634, at 15 (*Heller* did not overrule favorable Eleventh Circuit decision in *Anderson v. City of Atlanta*), 15-16 ("*Heller* ... has no application here because the Kings have never contended that Trotter and Jackson were *solely* responsible for Jonathan's death") (emphasis in original), 17-18 (quoting holding in *Gibson v. County of Washoe*, 290 F.3d 1175, 1186 n.7 (9th Cir. 2002) that *Heller* is not applicable in all cases in which individual defendants were not liable).

as we explain below, that was not the basis of the Georgia Court of Appeals decision. Rather, the Court of Appeals rejected plaintiffs' claim only under *Heller*, holding that Pioneer could not be held liable regardless of whether the collective actions of several of its employees had indeed resulted in a constitutional violation.

Whether Pioneer had a constitutional duty to protect Jonathan is governed by this Court's decision in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), and its progeny. "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." 489 U.S. at 199-200. The lower courts have generally held that the mere obligation to attend public school does not without more create an affirmative duty to protect ordinary students. (See Pet. App. 12a-13a). The question in this case was whether when Pioneer confined Jonathan King in the "seclusion room," and "h[e]ld[ ] him there against his will," it had "to assume some responsibility for his safety." Pioneer contends that the Court of Appeals in fact resolved this constitutional issue, and that its decision on this constitutional question is thus an alternative state ground that bars review by this Court of the Court of Appeals decision regarding *Heller*.

The standard for demonstrating the existence of an independent state ground is well-established and demanding. To defeat review of the Court of

Appeals' resolution of the *Heller* issue, respondent must show that "the state court decision indicates clearly and expressly that it is alternatively based on bone fide separate, adequate and independent grounds." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)[2]; see *id.* at 1041 ("plain statement"), 1042 (requirement of a "plain statement"), 1042 n.7 ("we require a clear and express statement that a decision rests on adequate and independent grounds"). The Court will assume there is no independent ground where it "is not clear from the face of the opinion." 463 U.S. at 1041. The "plain statement" requirement stems from a recognition that "it is ... important that ambiguous or obscure adjudications by state courts do not stand as barriers to determination by this Court of the validity under the federal constitution of state action." *Id.* (quoting *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)); see *Florida v. Powell*, 130 S.Ct. 1195, 1201 (2010) (quoting *Long* and *National Tea Co.*). "Ambiguities in th[is] regard must be resolved by application of the *Long* standard." *Harris v. Reed*, 489 U.S. 255, 262 (1989).

The Court of Appeals did not resolve the constitutional question regarding whether Pioneer had an affirmative duty to protect Jonathan King. The Court

[2] Respondent relies on the very different rule in *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). (R.Br. 13 n.30). *Stembridge* has not been the law for more than a quarter of a century; it was last cited in this Court in Justice Stevens' dissent in *Long*. 463 U.S. at 1060 (Stevens, J., dissenting).

of Appeals referred in only a single sentence to plaintiff's argument that use of the time-out room constituted confinement under *DeShaney*, and then turned immediately to the *Heller* analysis that was the actual basis of its decision.

> The Kings argue that confining Jonathan to the time-out room constituted a restraint on his liberty that was more analogous to that of an incarcerated inmate or an involuntarily-committed mental patient, and therefore Pioneer RESA had a duty to protect him. *However, even if we accept the premise* that sending Jonathan to the time-out room created a situation that was more analogous to that of an incarcerated inmate than to a middle-school student, the Kings' argument that Pioneer RESA deprived Jonathan of his right to substantive due process still fails. "To establish liability for a person's suicide under section 1983, the plaintiff must show that the jail official displayed 'deliberate indifference; to the prisoner's taking of his own life.'"

(Pet. App. 14a) (emphasis added) (quoting *Gish v. Thomas*, 516 F.3d 952, 954 (11th Cir. 2008)). The Court of Appeals opinion contains no discussion whatever of whether the circumstances under which Jonathan King was confined in the "seclusion room" were or were not sufficiently similar to incarceration or involuntary commitment to give rise to an affirmative constitutional duty of protection.

Respondent contends that the phrase "even if we accept the premise" somehow indicated that the Court of Appeals had indeed rejected plaintiff's contention. (Br. Opp. 9 and n.25). The phrase "even if," however, can refer to a premise the speaker thinks likely ("I am going to the playoffs even if the Yankees are playing") or is unlikely ("I am going to the playoffs even if the Nationals are playing"). This Court has used the phrase "even if" to refer to a premise the Court has accepted,[3] to a premise the Court has rejected,[4] and to a premise about which the Court has no view.[5] As used in the opinion below the phrase "even if" signals that the Court of Appeals was hypothesizing an answer to a constitutional question it was not deciding.[6]

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[3] E.g., *Yeager v. United States*, 129 S.Ct. 2360, 2370 (2009) ("the Government argues that even if we conclude (as we do) ... ").

[4] E.g., *Kawasaki v. Kisen Kaisha Ltd v. Regal-Beloit Corp.*, 130 S.Ct. 2433, 2446 (2010); *Waddington v. Sarausad*, 129 S.Ct. 823, 833 (2009).

[5] E.g., *Graham v. Florida*, 130 S.Ct. 2011, 2032 (2010); *Chambers v. United States*, 129 S.Ct. 687, 692 (2009).

[6] Later in its opinion the Court of Appeals used a similar phrase.

> [I]n sending Jonathan to the time-out room, neither Jackson nor Trotter deliberately disregarded a strong likelihood that Jonathan would harm himself.... *Accordingly, even if* we were to conclude that Jonathan's confinement created an affirmative duty for Pioneer RESA to protect him from harming himself, the Kings have not demonstrated that the two school officials actually responsible for that confinement deprived Jonathan of his substantive due process rights.

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The Court of Appeals' opening summary of its decision refers exclusively to its holding (under *Heller*) that Pioneer could not be liable because no individual staff member had been deliberately indifferent to the danger to Jonathan.

> [W]e find that the Kings have not met the requirements of § 1983 in that they have not shown that the Alpine staff members were deliberately indifferent to Jonathan harming himself. *Thus*, the Kings have not demonstrated that Jonathan's suicide was caused by a violation of his substantive due process rights, and their § 1983 claims necessarily fail. *Accordingly*, we affirm the trial court's grant of summary judgment to Pioneer RESA.

(Pet. App. 2a) (emphasis added).

Respondent relies largely on a two-word sentence at the end of another introductory paragraph in the appellate opinion:

> The Kings contend that the trial court erred in granting summary judgment to Pioneer RESA as to their § 1983 claims. Specifically, they argue that questions of material fact

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(Pet. App. 15a-16a) (emphasis added). If the Court of Appeals had actually resolved the affirmative duty issue, the second sentence would have begun with the counter-factual conditional phrase "Accordingly, even if we had concluded that."

> remain as to whether Pioneer RESA had an affirmative duty, under the due process clause of the Fourteenth Amendment, to prevent Jonathan from harming himself and that such questions also remain as to whether Pioneer RESA's conduct, policies, and employee training procedures demonstrated a deliberate indifference to that duty. We disagree.

(Pet. App. 9a; see R.Br. 8).

This sentence is not sufficient, in the context of the opinion as a whole, to satisfy the *Long* "plain statement" requirement. It is unclear whether the court is asserting that there were no factual disputes at all, or that the disputed factual issues were not material. Disputes about any of these factual issues would indeed have been immaterial in light of the Court of Appeals' conclusion that the plaintiffs' claims against Pioneer were barred by *Heller* regardless of whether there had been a violation of Jonathan's constitutional rights. Respondent suggests that the referenced facts might also have been deemed immaterial for a second reason, and speculates that the unarticulated additional reason was a construction of *DeShaney*. But nothing in the body of the opinion supports that contention.

Following the decision of the Court of Appeals, plaintiffs sought certiorari in the Supreme Court of Georgia. That state court petition asked the Georgia Supreme Court to decide two distinct questions, whether the Court of Appeals had misapplied *Heller*[7] and whether Pioneer had an affirmative constitutional duty to protect Jonathan.[8] Respondent asserts that because the Georgia Supreme Court was asked to hear the two issues, plaintiffs necessarily "understood that they had lost in the Court of Appeals on *both* grounds." (Br. Opp. 10) (emphasis in original). That is not correct. The state certiorari petition expressly stated to the contrary that the Court of Appeals had *not* addressed the second issue.

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[7] Petition for Writ of Certiorari, *King v. Pioneer Regional Educational Service Agency*, No. S10C0634, at 9:

> Whether the COA erred by holding that the King's claim that Pioneer's deficient policies, procedures, practices, and customs caused a violation of Jonathan's constitutional rights under *Monell* [*v. Department of Social Services*, 436 U.S. 658 (1978)] necessarily fails because the Kings did not show that Trotter and Jackson independently and individually violated Jonathan's constitutional rights.

The state court petition's analysis of this issue rested heavily on *Heller*. *Id.* at 14-18.

[8] *Id.*:

> Whether Pioneer had an affirmative duty to protect Jonathan King that arose when its employees locked Jonathan in a concrete seclusion room and held him there against his will, and whether a reasonable jury could conclude that Pioneer violated that duty.

> The COA assumed without deciding that Pioneer owed Jonathan an affirmative duty of care because it confined him to the seclusion room.... The COA dodged this issue, assuming but not deciding that Pioneer owed Jonathan an affirmative duty.[9]

In its brief opposing review by the Georgia Supreme Court, respondent did not dispute this characterization of the Court of Appeals opinion.[10]

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[9] *Id.* at 8-11; see *id.* at 3 ("the Court of Appeals refused to consider whether *Pioneer's* custom, policy, or practice caused Jonathan's injury. Instead, the court found that the King's failure to show that Trotter and Doug Jackson ... personally violated Jonathan's constitutional rights ... barred their claim against Pioneer"), 11-12 ("instead of assuming the existence of such a duty, the COA should have expressly found that one existed").

Similarly, although the Petition asserted that *Heller*-related question was whether "the COA erred" in holding that liability on the part of Pioneer required a showing that an individual employee had committed a violation, the Petition's description of the affirmative duty question made no reference to any COA error or decision. See nn.7 and 8, *supra*.

[10] Response to Petition for Certiorari, *King v. Pioneer Regional Education Service Agency*, No. S10C0634, at 18-22.

Following the Court of Appeals decision, plaintiffs sought reconsideration in that court of the *Heller* issue; plaintiffs did not seek "reconsideration" regarding the affirmative duty issue because that issue had not been resolved by the Court of Appeals. Motion for Reconsideration, *King v. Pioneer Regional Educational Service Agency*, Appeal No. A09A1567. In its response to the Motion for Reconsideration, Pioneer did not suggest, as it does in this Court, that the Court of Appeals decision also rested on a determination that Pioneer did not owe Jonathan King any affirmative duty. Response to Motion for

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Respondent appears to suggest that the trial court decision on the affirmative duty issue is now "law of the case" under Georgia law, even if it was never addressed by the Court of Appeals. (Br. Opp. 11-12). But under Georgia law only a "ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case." O.C.G.A. § 9-11-60(h). Because the Court of Appeals did not address this issue in its decision, that court (and the Georgia Supreme Court) would be free to do so on remand.

Finally, respondent argues that the trial court's holding that Pioneer had no constitutional duty to protect Jonathan is "unreversed" (Br. Opp. 10) and "undisturbed." (Br. Opp. 8). But that is true only because the Court of Appeals did not reach this issue, not because the Court of Appeals reached the question and upheld the decision of the trial court.

Reconsideration on Behalf of Appellee Pioneer RESA, *King v. Pioneer Regional Educational Service Agency*, Appeal No. A09A1567.

III. THE EXISTENCE OF UNRESOLVED DEFENSE CONTENTIONS DOES NOT PRECLUDE REVIEW OF THE QUESTION PRESENTED

Respondent argues that there are perhaps a dozen other grounds on which it may ultimately prevail on remand. (Br. Opp. 13-29). Respondent does not, however, contend that the Court of Appeals addressed any of these additional contentions; it asserts only that on remand many other arguments for dismissing the complaint would still be "available." (Br. Opp. 14).

The existence of such unresolved contentions is not a basis for denying review. Where a lower court has granted summary judgment or dismissed a civil or criminal proceeding, it will usually be the case that the defendant also has additional as yet unadjuciated arguments on which it could ultimately prevail. That ever present possibility has never been grounds for denying certiorari.

Respondent proffers a range of fact-bound arguments about the merits of its various alternative defenses, and invites the Court to deny the petition based on a forecast about how the Georgia courts might rule on those contentions when they have been fully briefed and argued on remand. It is not the practice of this Court to engage in such speculation. Indeed, the Court "may review a state case decided on a federal ground even if it is clear there was an available state ground on which the state court *could*

properly have relied." *Michigan v. Long*, 463 U.S. at 1039 n.4. (Emphasis added).

CONCLUSION

For the above reasons, this Court should grant a writ of certiorari to review the judgment and opinion of the Georgia Court of Appeals for the Third Division.

Respectfully submitted,

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